IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 45

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California, EDMUND G. BROWN, Governor of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellees.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' REPLY BRIEF

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Three-judge court

It is not clear whether appellees mean to urge that the case was not heard and determined by a three-judge court, or whether the contention is abandoned. (Appellees' brief, pp. 2-3.) If the contention may be regarded as still pending, appellants submit the following suggestions.

First, since appellees procured entry of the judgment appealed from and pray for affirmance of the judgment

by this court, they are hardly in a position to contend that the judgment is invalid.

Second, there is no basis in the record for an assertion that the honorable Judge Goodman, who died September 15, 1961, failed to participate in any of the determinations made by the district court. There is only the bare notation that because of his death on September 15, 1961 he was unable to *sign* the findings and orders dated September 20, 1961. (R. 777, 781, 783, 784.) The matters embraced in these orders were before the court for consideration a long time before the death of Judge Goodman, with nothing in the record to indicate inability of his honor to participate in the consideration and determination of these matters.

The "Memorandum and order" of the court, deciding the case, was handed down July 10, 1961. (R. 757.) Proposed findings of fact, conclusions of law, judgment order, and the anomalous document entitled "Order *re* motion to substitute and ruling on evidentiary matters" were submitted by appellees to counsel for appellants for approval or disapproval, then filed together with appellants' objections thereto on August 4, 1961. (R. 770.) A reply to appellants' objections was then filed by appellees on August 7, 1961. (R. 773.) Thus, all matters embraced in said documents submitted by appellants were before the court for consideration and determination 39 days before the death of Judge Goodman, with no suggestion of incapacity of his honor during this period, or of non-participation in any of the determinations embodied in the findings and orders signed by the two surviving judges on September 20 1961. (R. 777-784.)

Rulings on appellants' evidence

The main feature of appellees' brief is repetitious argument that the appellants rely upon evidence "not admitted" by the district court. This argument, so elaborately presented, is based entirely upon paragraphs 2 and 3 of the so-called "ruling" on evidentiary matters made contemporaneously with the final judgment. (R. 782, 783.) In this "ruling," it is stated that the depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish, also plaintiffs' exhibits 1 through 20, "are not admitted into evidence, but have been considered by the court as an offer of proof by plaintiffs." Since the transcript of trial proceedings is devoid of any "offer of proof" by counsel for plaintiff on any subject, it is manifest that the foregoing post-trial assertion, whatever meaning it is intended to convey, is sheer fiction. This is readily apparent from examination of the record of trial proceedings.

The depositions of David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall and Fred Piowaty, called as witnesses by appellants, and of R. M. Wimbish, called by appellees, were taken at Miami, Florida, January 21 to 23, 1958, pursuant to written stipulation that the depositions "are not being taken for purposes of discovery but are to be offered in evidence." (R. 144.)* Plaintiffs' exhibits 1 to 22 form part of these depositions. The completed depositions were filed March 14, 1958 and presented to the court for consideration by appellees in support of their dual motion to dis-

*The stipulation to take depositions is omitted in the printed record. (See Appellees' Brief pp. 45-46.)

miss the action. (R. 60-61, 98-99.) These depositions, thus opened and presented to the court on the initiative of appellees, without question as to validity *in toto*, or objection to any portions thereof, were freely cited in the presentation of appellees' motion. (See "Defendants' points and authorities in support of motion," R. 61-79, 100-117.)

The judgment order entered January 13, 1959, from which the prior appeal in this case was taken, recited:

> "This cause coming on for hearing on April 18, 1958, on defendants' motion to dismiss the action because the plaintiffs failed to allege facts showing a cause of action within the jurisdiction of the United States District Court, and the court having heard the argument of counsel, both written and oral, and having considered the depositions, affidavits, and exhibits presented by the parties hereto in connection with the hearing thereof, and the court being fully advised, it is by the court, this 13th day of January, 1959, ordered that said motion be granted, etc." (R. 125.)

On the appeal to this court, the depositions, including plaintiffs' exhibits 1 to 22, were part of the record upon which the case was considered and determined by this court, all without question as to the validity of the depositions or any portion thereof. (No. 49, October Term 1959, R. 112-447.)

At an early stage of the trial commencing February 7, 1961, in course of the examination of appellants' witness Dr. Paul L. Harding, appellants' counsel requested that a document identified by the witness be

marked plaintiffs' exhibit 23 for identification, whereupon the following occurred (R. 575):

"Judge Goodman: What is it? You want an identification number for some document?

Mr. Ferguson: 23.

Judge Goodman: One. It should be one.

Mr. Ferguson: Well, it would conflict with the numbers that appear in the record already. I think it would be more convenient to go on with that number series.

Judge Goodman: These are exhibit numbers of documents in the depositions?

Mr. Ferguson: Yes, your honor.

Judge Goodman: I suggest again to you, counsel, to offer your depositions in evidence, and then we will have a record of them. Don't you want to do that?

Mr. Ferguson: Certainly I do. I just question as to the time, as to when.

Judge Goodman: Well, we will make the time right now. Just offer them in evidence, what you want, and then we can get the next exhibit number. The depositions are all together, are they?

Mr. Fourt: We object, your honor, and we respectfully ask permission and request that they be read in order that we may make objections to the testimony. We have a written memorandum prepared outlining objections to each proposed item. We have objections to many of the answers as being hearsay.

Judge Goodman. We will mark—do you wish to have the depositions marked?

Mr. Ferguson: Yes, your honor.

Judge Goodman: We will mark the depositions in evidence and we will reserve ruling on the objections that you have filed when we have had a chance to examine them.

Mr. Fourt: Thank you very much."

The matter of reading the depositions was adverted to again, in connection with the transcript to be furnished to the court. (R. 683.) First, the court requested that all of the oral testimony should be transcribed by the reporter. Then his honor Judge Halbert added the following (R. 683):

> "Judge Halbert: Now, as to the documents that have been received by way of depositions, they may be considered read into the record, but need not be transcribed for the purpose of this record by the reporter.
>
> Mr. Fourt: No, your honor. We have reserved our right to object to each sentence as it is read into the record.
>
> Judge Halbert: I understand that, and furthermore there is no sense in copying this book here again into the record."

Judge Halbert's reference to "this book" relates to the printed record on the prior appeal, a copy of which was furnished to each member of the court at the commencement of the trial.

The discussion proceeded further, as follows (R. 684):

> "Mr. Fourt: The matter of the depositions we understand is not now in evidence.
>
> Judge Halbert: It is offered subject to your objections.

Judge Goodman: Subject to your objections, which you can present in your brief. . . . We may decide this case—I am not going to disclose the secret workings of our minds, but we may dispose of this case without any need of acting upon objections to depositions. We are not going to consider that unless it is necessary. If it is necessary, then we will have to have another hearing.

Mr. Fourt: If the court please, just allow us to raise our objections at this time.

Judge Halbert: You have got that already. We have told you that your objections stand to every word that is in these depositions here, and that if it becomes necessary for us to have another hearing I think we ought to, but I don't think there would be any useful purpose served by our sitting here hour after hour while these things are read to us, and you object to each word and phrase in the matter. As Judge Goodman has suggested, if we approach that and it becomes necessary we will have another hearing, but I don't want to do it now.

* * *

Mr. Fourt: Do I understand, sir, that the depositions are not now in evidence and that if the court desires to read them there will be another hearing?

Judge Goodman: They are all in evidence subject to your objections and the court will rule on them when it makes its ruling in the case if it is necessary.

Mr. Fourt: Thank you, your honor." (R. 684-685.)

What happened subsequently was that appellants, in their post-trial brief (Appendix III), submitted argument on the matter of the admissibility of the deposition evidence, also plaintiffs' exhibits 23, 24, 25 and 26; appellees, in their reply brief filed April 26, 1961, argued at length their objections to the admissibility of various items of appellants' evidence; then appellants, in their closing memorandum filed May 19, 1961, answered in further detail all of appellees' objections.

The reason why appellants' trial court briefs are not part of the printed record, also why there is no argument in appellants' original brief on the subject of admissibility of evidence, is quite simple, namely, that the district court made no rulings on any of appellees' objections, thus leaving no question of admissibility of evidence to be raised or considered on this appeal. Instead, in the "Memorandum and Order" of July 10, 1961, the district court declared:

> "The evidence has been heard, with the ruling on certain objections by defendants having been reserved . . . The court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the court has reserved its ruling. The exhibits and depositions are very voluminous, as are the objections to them. We will assume, *arguendo*, that the exhibits and depositions offered by plaintiffs are all admissible." (R. 758.)

The meaning of the word "*arguendo*" in the above context is quite enigmatic. However, whether *arguendo* or otherwise, the record is clear that the court considered and decided the case on the assumption that

all of the evidence to which appellees submitted objections was admisssible. Without more, the evidence assumed to be admissible for the purpose of the determination of the case made by the district court remains equally available for the determination of the case to be made on this appeal.

It is unabashedly asserted in appellees' brief (p. 9) that the district court, following the filing of trial briefs, ruled on the reserved objections of appellees to evidence introduced by appellants, citing R. 782. Manifestly, no ruling on any of appellees' objections is to be found at page 782 or anywhere else in the record. To illustrate, the general objection made by appellees to the admission of the depositions was that appellants made no showing that the deponents, who resided in towns south of Miami, Florida, were at a greater distance away from Sacramento, California, than 100 miles. (R. 726-727.) It would be astonishing, indeed, to find a ruling of the district court sustaining this objection. Nor are there rulings on the numerous detailed objections made by appellees to various items in the depositions.

As to plaintiffs' exhibits 23, 24, 25 and 26, these are records of the research on the subject of maturation and quality of the avocados grown in Florida conducted by Dr. Harding and his staff at the Orlando and Miami agricultural stations of the United States Department of Agriculture,—records made and kept by Dr. Harding and his assistants in the regular course of the performance of their duties as employees of the Department of Agriculture. (R. 568-569, 573, 583.) At page 49 of appellees' brief, it is stated that the

district court reserved ruling on the admissibility of these exhibits, "Having previously ruled such evidence to be immaterial," citing R. 574, 577. This is a flagrantly erroneous statement.

When Dr. Harding was asked to identify plaintiffs' exhibit 23 and to indicate the nature of its contents, the presiding judge interrupted as follows (R. 577):

> "Judge Goodman: Counsel, I am going to interrupt again. Your opponent once before objected to this." (The record reveals no such objection.) "We are not required in a three-judge court hearing in which is involved the validity of a state law to hear all kinds of evidence as you would if you were trying a case before a jury or an ordinary civil action. Only such evidence as is necessary to determine the question of the invalidity of the statute is all we need to hear. . . . .* We are not going to encumber the record with things like this. So I will sustain the objection that was made to this exhibit.
>
> Mr. Ferguson: I haven't offered it yet."
>
> Judge Goodman: I thought you had.
>
> Mr. Ferguson: I have to lay the foundation for the offer."

Subsequently, additional research records produced by Dr. Harding were marked for identification as plaintiffs' exhibits 24, 25 and 26 (R. 583); plaintiffs' exhibits 23, 24, 25 and 26 were then collectively offered

*This extraordinary pronouncement by the presiding judge to the effect that in a trial by a three-judge court, rather than by a single judge or judge and jury, only limited evidence need be heard, sheds light on the court's cavalier disposition of the issues of the case.

in evidence (R. 603); thereupon objection was made that the documents were hearsay and irrelevant (R. 610-611). No ruling was made on these objections when asserted, nor at any time thereafter. Instead, they were treated by the court in the same manner as the reserved objections to the depositions and the matters therein contained, as above recited. Had these exhibits been excluded, as stated in appellees' brief, there would of course have been no occasion for appellees to reassert and argue objections thereto in their post-trial brief. (R. 722-726.)

Reverting finally to paragraphs 2 and 3 of the so-called post-trial "Ruling on evidentiary matters" (R. 782), the declaration that the depositions and plaintiffs' exhibits "are not admitted" in evidence is in no sense a ruling on any of the objections made by appellees to the admissibility of evidence. Nor could such declaration serve to erase from the record the rulings at the trial receiving this evidence subject to appellees' objections. It is elementary that objections reserved and never ruled upon become a nullity and call for no consideration by a reviewing court. (See *Clauson v. United States*, 8 Cir., 60 F. 2d 694, headnote 4.)

Paradoxically, paragraphs 2 and 3 of the post-trial "Ruling on evidentiary matters" amounts to an affirmation in another form that the district court gave such consideration as it deemed requisite to the challenged evidence in its determination of the case. To say that the evidence was considered by the court as "offer of proof" is but another version of the statement in the court's opinion that the evidence was considered "arguendo." Whether considered "arguendo," or as fictitious "offer of proof," the evidence is now before

this court for such consideration as may be deemed appropriate, with no occasion to give attention to appellees' extensive argument on the subject of admissibility of evidence.

Appellees' criticism of regulations under federal marketing order

As stated in appellants' original brief (p. 34), appellees were permitted by the district court to interpose a defense challenging the integrity of the regulations issued by the Secretary of Agriculture under the Florida avocado marketing order, but withdrew this defense upon the trial of the case. (R. 119, 571.) This occurred after appellees had obtained and marked for identification the annual reports of the Avocado Administrative Committee, also a complete set of the minutes of meetings of the committee held from May 4, 1957 to December 10, 1957 (R. 187-190); also after counsel for appellees had cross-examined the witness David M. Biggar regarding the functioning of the committee (R. 176-192) and had taken the deposition of R. M. Wimbish regarding the manner in which the Florida avocados were inspected prior to shipment. (R. 332-351.)

Notwithstanding the abortive attempt to impugn the administration of the marketing order, appellees revert to the withdrawn defense in their brief filed in this court. At pages 15-16 and 38-42 of appellees' brief, the validity of the maturity regulations issued by the Secretary of Agriculture is questioned because these regulations followed the recommendations of the Avocado Administrative Committee, composed of growers and handlers of the Florida avocados. Quite vaguely, it is intimated that the marketing order is

duplicitious because it makes provision for exemptions or variances from the maturity regulations to be granted by the committee in conformity with rules to be approved by the Secretary (Sec. 969.53 of marketing order), also because daily shipments not exceeding 55 pounds (one bushel) and Christmas gift shipments not exceeding 20 pounds are exempted from the maturity regulations (pursuant to Sec. 969.55 of the marketing order, R. 28, 29). Another criticism is that although some avocados are grown commercially in "north Florida," these avocados are not included in the marketing order.

Passing the point of law that appellees have no standing to challenge the validity of the marketing order and the regulations issued thereunder,* the criticisms submitted by appellees are pointless. Although the Avocado Administrative Committee is charged with the duty of recommending to the Secretary the maturity regulations deemed proper, these recommendations are adopted at meetings of the committee attended by representatives of the Department of Agriculture and the committee is required to submit to the Secretary with each recommendation the data and information upon which it is based. (R. 27, 207.) Moreover, since the

*Orders issued by the Secretary of Agriculture under the Marketing Agreement Act can be challenged only by persons directly affected thereby, in proceedings to which the Secretary is a party. (See: *Stark v. Wickard*, 321 U. S. 288, 64 S. Ct. 559; also *United States v. Western Fruit Growers*, 9 Cir., 124 F. 2d 381; *La Verne Co-op Citrus Assn. v. United States*, 9 Cir., 143 F. 2d 415, 418; *Panno v. United States*, 9 Cir., 203 F. 2d 504; *Gudgel v. Iverson*, D.C. Ky., 87 F. Supp. 834, 841; *United States v. Superior Court of Los Angeles County*, 19 Cal. 2d 189, 197-198.)

growers and handlers of the fruit procured adoption of the marketing agreement in order to protect the Florida avocado industry from deterioration, it is absurd to suggest that the members of the Administrative Committee nominated by the growers and handlers and appointed by the Secretary of Agriculture would undermine the entire program of regulation by recommending false or inadequate regulations. Nor is there the least evidence that any of the regulations recommended by the committee did in fact result in the shipment of immature or low grade avocados.

The provision for exemption certificates does not dispense with the requirement of maturity, but provides for procedural rules pursuant to which it may be determined that some avocados of a particular variety have attained requisite maturity at a date earlier than anticipated when the applicable maturity regulation was promulgated. (R. 28.) Again, there is no evidence that the issuance of an exemption certificate, in any instance, resulted in the shipment of immature avocados. To question the exemption of small Christmas shipments, or of one bushel a day, is sheer triviality. And, as to avocados said to be produced commercially in "north Florida" and omitted from the marketing order, the existence of such avocados has escaped mention in the record of this case. If there are any such avocados, it is not explained by appellees how non-inclusion thereof in the marketing order renders the order defective.

Finding re "temptation" to market immature avocados

Finding of fact No. 4 (R. 779), echoing what is said in the district court's opinion (R. 759), declares that "There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high." This sapient commentary on human nature, submitted as a "finding of fact," is not derived from any evidence applicable to the current marketing of avocados by appellants or others. However, it is because prior to the adoption of the federal marketing agreement some growers and handlers of Florida avocados were marketing immature or low grade avocados, whether inadvertently or because of "temptation," that at least two-thirds of the producers of Florida avocados (in number, or in volume of production) and at least 50% of the handlers of Florida avocados desired to be protected from the detrimental effect on the growing industry of shipments of immature or inferior avocados, therefore requested the Secretary of Agriculture to enter into a marketing agreement under which shipment of immature or inferior avocados from the Florida production area would be effectively barred.

The record of this case is devoid of any evidence indicating that at any time since June 11, 1954, when the Florida avocado order went into effect, any growers or handlers of Florida avocados have knowingly sought to market sub-standard avocados. The withdrawal of appellees' attempted impeachment of the administration of the marketing order ("fifth defense," R. 119, 571) is in effect an admission that no im-

mature or otherwise substandard avocados have in fact been shipped from Florida since the marketing order became effective.

If regarded as a "finding of fact," the district court's cynical animadversion upon the susceptibility of the growers of avocados to temptation has no vestige of support in evidence applicable to appellants or other present-day growers and handlers of Florida avocados, therefore merits no consideration by this court. (*United States v. Gypsum Co.*, 333 U. S. 364, 393-399, 68 S. Ct. 525, 541-544; *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 658, 65 S. Ct. 870, 874.)

Oil content of Florida avocados

The subject of oil content of the Florida avocados and the relation of such oil content to maturity and palatability,—as to which the district court made findings Nos. 5, 6 and 11 (R. 779-780),—is fully discussed in appellants' original brief (pp. 9-30) and this discussion will not be here repeated. Attention will be limited to examples of the argument submitted in appellees' brief in an endeavor to justify the district court's findings.

Appellees urge (brief p. 7) that because of the close relationship between oil content and the maturation of the fruit, oil content has been found to be the best available index of the maturity of the avocado, citing R. 628-29, 648, 666, and finding No. 5 at R. 779. The references are, first, to a statement of opinion by H. W. Poulsen, Chief of the Division of the Standardization and Inspection Services of the California Department of Agriculture, who professed no knowledge whatever regarding the characteristics of the avocados

grown in Florida other than the fact that it was reported to him that some of the avocados shipped from Florida to California were rejected for sale in California because they did not test 8% oil content. (R. 639-640.) Even as to California avocados, Mr. Poulsen's knowledge was merely that they became legally "mature" when they tested 8% oil content, even though of varieties that attain 15% to 20% oil content, or even higher. (R. 635.) He knew also that the leading varieties of Florida avocados are not grown commercially in California, namely, the Lula, Waldin, Booth 7, Booth 8, or other Booth varieties. (R. 636.)

Next, appellees refer to a statement of opinion by Dr. David Appleman, who testified merely that he had familiarity with only two varieties of California avocados, the Fuerte and Hass, because he had made use of these avocados as material in certain biochemical research which had nothing to do with maturity or edibility of the fruit. (R. 564.) As to Florida avocados, Dr. Appleman frankly stated: "I don't know anything at all about Florida avocados." (R. 658.)*

Appellees refer, finally, to the testimony of Presley Wiggs, an officer of Calavo Growers of California. (Brief, p. 666.) Again, the testimony is a bare statement of opinion that "The 8% oil content is effective in keeping immature fruit off the market." Like Mr.

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*Dr. Appleman also admitted that he had not during recent years read any writings on the subject of maturation of avocados, not even the writings of Dr. Sinclair and Dr. Bean, who for several years have been engaged in the study of maturation of avocados at the Citrus Experiment Station of the University of California at Riverside, California. (R. 654-655.) It is indeed significant that these scientists, currently engaged in study of the subject and available to appellees as witnesses, were slighted in favor of Dr. Appleman.

Poulsen and Dr. Appleman, Mr. Wiggs claimed no knowledge of the Florida avocados, except that he had for a period of years been in charge of the sales offices of Calavo in San Antonio, Dallas, Houston and Juarez, and that Calavo had sold Florida avocados in this territory. Mr. Wiggs testified that from about 1939 to 1957 Calavo sold Florida avocados in large volume throughout the country; that this included sales of the West Indian varieties with oil content well below 8%, except in California. (R. 667-669.) As to any and all varieties of Florida avocados sold by Calavo, there is no suggestion in the testimony of Mr. Wiggs that Calavo concerned itself with the percentage of oil content of the fruit in any state other than California.

On the basis of the foregoing references to the record and nothing more, appellees argue that "The findings of the district court with respect to the economics of avocado marketing and the biology of the avocado depended upon the credibility of the expert witnesses produced by each party at the trial," and that the court found the evidence on behalf of appellees entitled to greater weight. (Brief, p. 19.) Since the only evidence of expert witnesses on the subject of maturation and palatability of the avocados grown in Florida, the only avocados within the issues of this case, is that of appellants' witnesses Dr. Roy W. Harkness and Dr. Paul L. Harding, there is here no conflict of expert evidence and no occasion to resolve any such conflict on the basis of comparative credibility of the witnesses. Instead, the district court and appellees chose to disregard entirely the testimony of appellants' witnesses, except for certain shocking distortions of this testimony in appellees' brief.

One example of the calibre of appellees' argument on the subject of oil content of Florida avocados is the quotation from the deposition of Dr. Harkness of a sentence appearing at page 215 of the record, *viz.*: "The Waldins did not reach eight percent, let's say, until December, which is the normal time for picking Waldins." (Brief, p. 29, footnote.) The record of this case shows over and over again that the Waldins are avocados of West Indian antecessors, which come to maturity and are picked and marketed in August and September, with negligible holdovers in the forepart of October. (R. 356, 360, 361, 364, 379, 590.) The many hundreds of oil tests made by Dr. Harkness (R. 289-430) show no oil tests of Waldins later than the months of July, August and September, except a single test as late as October 6 at 6.5% oil content. (R. 390, 391, 392, 393, 394, 395, 397, 409, 410.) Manifestly, the sentence quoted from the deposition of Dr. Harkness, to the effect that the normal time for picking Waldins is December, is a palpable error of reporting or transcription, overlooked before the deposition was filed, yet it finds place in appellees' brief.

Of like calibre is the assertion that Dr. Harding testified that the hybrid and Guatemalan varieties of Florida avocados attain oil content as high as 20% while still in prime marketing condition. (Brief, pp. 7 and 25, citing R. 577.) The reference is to an answer made by Dr. Harding to a question propounded by Judge Halbert, not with respect to any of the varieties of avocados grown in Florida, but instead expressly directing the witness to state the minimum and maximum oil content of avocados, "I don't care

whether they are in Florida, California, Michigan or South America or where they are." To this question the witness first answered 1% to 20%. (R. 576.) Upon further questioning by Judge Halbert, Dr. Harding stated that the West Indian varieties of avocados have oil content of 3% to 4% or even 5% when they are mature and ripe. Judge Halbert then repeated:

> "Dr. Harding, I am not talking about varieties, I am talking about an avocado that is ripe, the least amount of oil that you would find in such an avocado. I don't care where it comes from, what kind it is, its size, shape, color or anything else."
>
> A. If you are talking about the minimum, I would say that avocados are acceptable and palatable at 2 and 3 percent as a minimum.
>
> Q. All right. Now, what is the maximum that avocados may contain and still be marketable and palatable?
>
> A. I have only experience in Florida, therefore I can answer your question somewhere around 15 to 20 percent." (R. 577.)

Subsequently, Judge Halbert interrogated Dr. Harding specifically about the oil content of the varieties of avocados grown in Florida, whereupon the witness testified that some 44 varieties are regulated under the marketing order and that of these only half a dozen have 8% oil content when they mature; that late in the season the Lula would average 8%, perhaps the Booth 8 in very late season, likewise the Booth 7, also three very minor varieties; that most Lulas and Booth 8s—by far the two leading varieties—would reach 8% oil content some time in their lifetime if left on the

tree, but these avocados may be picked long before they reach 8%; that perhaps the last 20% of the shipment of these avocados may meet the 8%; that in the case of the Waldin, before the 8% is reached, you would probably have all your crop drop, and in the case of the Booth 8 you would probably shorten the season far beyond what it should be shortened; the same way with some of the other varieties, they would be overripe and wouldn't have the carrying qualities. (R. 616-620.)

To mention but one other example of appellees' argument, reference is made in appellees' brief (footnotes, pp. 26 and 27) to a writing by Dr. Stahl, published in 1933, regarding certain research conducted by him in the years 1929 to 1931 on the subject of maturation of some unidentified varieties of Florida avocados. In the stipulation to take depositions in Florida, the name of Dr. Stahl was included as a possible witness and it may be assumed that he would have been called to testify if he had any data or opinions of current relevancy to offer.

All that appears in the trial record regarding the contents of Dr. Stahl's writing is the following cross-examination of Dr. Harding by appellees' counsel (R. 607-608):

> "Q. Doctor, would you agree with this statement of Dr. Stahl in the 'Changes in composition of Florida avocados in relation to maturity,' in May 1933, quote: 'The fat and oil of the avocado, of course, is its chief constituent other than water, and when it has reached its maximum there is no doubt that the fruit is mature?'

A. There wouldn't be any question there, because when it reaches its maximum, why, that would be even overripe, sir.

Q. Would you agree with this statement, quote: 'That fat content seems to be the best indication of maturity of the avocado; this can be very readily correlated with the maturity of the fruit?'

A. I wouldn't agree with that statement, sir.

Q. Would you say, then, that there is a difference of opinion between yourself and Mr. Stahl?

A. I would say on that point there is a very definite reason for change of opinion."

The answers of Dr. Harding, not the questions, constitute evidence in the case. In face of what appears in the trial record, the citations made by appellees of extracts from Dr. Stahl's 1933 publication are of dubious propriety and of no probative value.

Conflict between state and federal regulation: Parker v. Brown, 317 U. S. 341

Appellees say that comparison of the federal and state statutes here involved show that no conflict *per se* exists between them, citing *Parker v. Brown*, 317 U. S. 341. (Brief, p. 34.) Apparently, the meaning intended to be conveyed by appellees' statement is that both statutes may be simultaneously enforced, in all applications thereof, without conflict, since it is further argued that the objective in enacting the federal statute was to establish orderly marketing conditions for agricultural commodities in interstate commerce in order to achieve "parity prices" for such commodities, whereas there is nothing in California's Standardization Act about parity prices. Even if this were all, yet if the

achievement of "parity prices" called for regulation of the quality of the subject commodities by the federal government, simultaneous regulation of quality of the same commodities under state law would offend against the Supremacy Clause of the United States Constitution.

However, the matter is made explicit by Sec. 602 (3) of the federal statute (Appellants' original brief, p. 89), deliberately omitted in appellees' brief (see p. 55) and ignored in appellee's argument. By Sec. 602 (3), independently of all provisions of the statute relating to maintenance of parity prices for the subject commodities, it was declared to be the policy of Congress, through the exercise of the powers conferred upon the Secretary of Agriculture by the statute, "to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest."

In *Parker v. Brown*, the matter in controversy was the enforcibility of a proration marketing program for the 1940 crop of raisins grown in California, adopted pursuant to the California Agricultural Prorate Act of June 5, 1933. The validity of the statute was challenged as in violation of the Commerce Clause of the United States Constitution and of the Sherman Act; also, as in conflict with the Agricultural Marketing Agreement Act of 1937. With respect to the alleged conflict between the state act and the federal act, this court held that such conflict did not exist in the absence of a concurrent marketing program for the Cali-

fornia raisins under the federal act. The court stated: "We may assume also that a stabilization program adopted under the Marketing Agreement Act would supersede the state act." (317 U. S. at p. 353.)*

It is of incidental interest to note that in the California statute authorizing the Director of Agriculture to issue orders regulating the marketing of agricultural commodities, as amended in 1961,** it is provided as follows:

"Agricultural Code, Sec. 1300.15(13c):

> In addition to authority to issue marketing orders regulating the processing or preparation for marketing of any or all portions of any agricultural commodity processed within this State, and in addition to authority to issue marketing orders regulating the distribution of any and all portions of any agricultural commodity within this State and subject to the legislative restrictions and limitations of Section 1300.14 of this chapter, the director may also issue marketing orders regulating the handling, processing, preparation for marketing or marketing of any or all portions of any agricultural commodity produced in this State for

*Regarding the contention made in *Parker v. Brown* that the state act was in violation of the Commerce Clause even without implementing federal legislation of any kind, this court held that the challenged state regulation applied wholly to intrastate commerce and not to interstate commerce. In the present case, the opposite is true. The challenge of appellants is to the application of the state regulation to the interstate marketing of the Florida avocados. (See the comprehensive analysis of the decision in *Parker v. Brown* made in the treatise of M. Ramaswamy on "The Commerce Clause in the Constitution of the United States," pp. 259-268.)

**Stats. 1961 ch 147 § 1, 1961 Supplement to Deering's Agricultural Code of California, p. 113.

which marketing regulatory powers are not being exercised by the federal government under the provisions of the Marketing Agreement Act of 1937, as amended, Public Law No. 137, 75th Congress, Chapter 296, First Session, 7 U.S.C.A. 674, 50 Statute 249."

Conclusion

It may fairly be said, it is submitted, that on the merits appellants' case is virtually uncontested. Two tangential and essentially pointless defenses are relied upon by appellees, first, that the 8% oil requirement for sale of avocados in California has been of benefit to the avocado industry of California, in that it has kept immature avocados off the market, and second, that in any event it would be commercially inexpedient to market the West Indian varieties of Florida avocados in California.

Since by far the greater part of the California avocado crop consists of avocados that come to market with 15% to 20%, or even higher oil content, notably the two dominant varieties, the Fuerte and Hass, the 8% oil requirement obviously is a decidedly minor factor in the marketing of the California avocados. With all the official records at hand, appellees submitted no evidence in support of their contention, only bare assertion of an unsupported conclusion by appellees' witness H. W. Poulsen, who could not name a single variety of California avocados that has difficulty in meeting the 8% oil standard (R. 631-632), a conclusion repeated by appellees' witness Presley Wiggs likewise without supporting evidence (R. 666). Although these assertions were received as expression of "opini-

on," it is not apparent how they fit into any category of expert testimony.

What is certain about the effect of the 8% oil requirement is that it has operated as a nearly complete embargo against the marketing of the Florida avocados in California, to the commercial advantage of the growers and handlers of the California avocados. Such local commercial benefit cannot validate obstruction of the freedom of interstate commerce.

As to the commercial practicability of marketing the West Indian varieties of Florida avocados in California, the cross-examination of appellees' witnesses Presley Wiggs and Albert C. Jones exposes the vacuous nature of this defense. (Appellants' original brief, pp. 36-38.) West Indian avocados from Florida, also in former years from Cuba, have been marketed over the years in the United States at distances as great or greater than the distance from South Florida to California. (See also, plaintiffs' exhibits 5 and 8, R. 358, 363.)

It is submitted, accordingly, that appellants have established their case by the overwhelming weight of the evidence,—evidence uncontradicted and unimpeached in any particular,—and that on the facts and the law the judgment of the district court should be reversed and appellants should be granted the relief prayed in their complaint.

Respectfully submitted,

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